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PRIVATELY FINANCED INFRASTRUCTURE PROJECTS

Draft chapters of a legislative guide on privately financed infrastructure projects

Report of the Secretary-General

I. INTRODUCTION

1. At its twenty-ninth session, in 1996, after consideration of the note by the Secretariat on build-operate-transfer (BOT) projects (A/CN.9/424), the United Nations Commission on International Trade Law decided to prepare a legislative guide to assist States in preparing or modernizing legislation relevant to those projects.[1] The Commission requested the Secretariat to review issues suitable for treatment in such a legislative guide and to prepare draft materials for consideration by the Commission.

2. At its thirtieth session, in 1997, the Commission considered an annotated table of contents setting out the topics proposed for inclusion in the legislative guide (A/CN.9/438, annex). The Commission also considered initial drafts of chapters I, "Scope, purpose and terminology of the *Guide*" (A/CN.9/438/Add.1), II, "Parties and phases of privately financed infrastructure projects" (A/CN.9/438/Add.2), and V, "Preparatory measures" (A/CN.9/438/Add.3), of the guide. After an exchange of views on the nature of the issues to be discussed and possible methods for addressing them in the guide, the Commission generally approved the line of work proposed by the Secretariat, as contained in those documents.[2] The Commission requested the Secretariat to seek

[1] *Official Records of the General Assembly, Fifty-first Session, Supplement No. 17* (A/51/17), paras. 225-230.

[2] Ibid., *Fifty-second Session, Supplement No. 17* (A/52/17), paras. 231-247.

the assistance of outside experts, as required, in the preparation of future chapters and invited Governments to identify experts who could be of assistance to the Secretariat in that task.

3. At its thirty-first session, in 1998, the Commission had before it revised versions of the earlier chapters, as well as initial drafts of additional chapters, which had been prepared by the Secretariat with the assistance of outside experts and in consultation with other international organizations. The documents included a revised table of contents (A/CN.9/444) and a draft of the introduction to the legislative guide (A/CN.9/444/Add.1), which combined, with amendments, the contents of documents A/CN.9/438/Add.1 and 2. Further documents included initial drafts of chapters I, "General legislative considerations" (A/CN.9/444/Add.2); II, "Sector structure and regulation" (A/CN.9/444/Add.3); III, "Selection of the concessionaire" (A/CN.9/444/Add.4); and IV, "Conclusion and general terms of the project agreement"(A/CN.9/444/Add.5), which incorporated some of the contents of document A/CN.9/438/Add.3. The Commission considered various specific suggestions concerning the draft chapters, as well as proposals for changing the structure of the legislative guide and reducing the number of chapters.[3] The Commission requested the Secretariat to continue the preparation of future chapters, with the assistance of outside experts, for submission to the Commission at its thirty-second session.

4. Pursuant to that request, the Secretariat has changed the overall structure of the legislative guide, combined some of its chapters, revised the documents considered by the Commission at its thirty-first session and prepared initial drafts of the remaining chapters, with the assistance of outside experts and in consultation with other international organizations. The complete draft of the legislative guide is contained in addenda 1-9 to the present document (A/CN.9/458/Add.1-9).

II. PROPOSED STRUCTURE AND CONTENTS OF THE LEGISLATIVE GUIDE

Introduction and background information on privately financed infrastructure projects

5. An earlier draft of the introduction was contained in document A/CN.9/444/Add.1. A revised draft, which takes into account suggestions made at the thirty-first session of the Commission,[4] is contained in an addendum to the present document (A/CN.9/458/Add.1).

6. In preparing the revised introduction, the Secretariat paid particular attention to the suggestion made at the thirty-first session of the Commission that some portions of the introduction were lengthy and could usefully be reduced, in particular those which anticipated to some extent issues that would be discussed in more detail in the substantive chapters.[5]

7. The revised introduction incorporates some of the contents of former chapter II, "Sector structure and regulation" (A/CN.9/444/Add.3), pursuant to the Commission's decision, at its thirty-first session, to move the substance of the discussion on competition and sector structure, then contained in sections A, "Market structure and competition", and B, "Legislative measures to implement sector reform", of that chapter to the introductory part of the guide.[6]

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[3]Ibid., *Fifty-third Session, Supplement No. 17* (A/53/17), paras. 12-206.

[4]Ibid., paras. 23-49.

[5]Ibid., paras. 32 and 47.

[6]Ibid., paras. 101 and 102.

Chapter I. General legislative considerations

8. An earlier draft of chapter I was contained in document A/CN.9/444/Add.2. A revised draft, which takes into account suggestions made at the thirty-first session of the Commission,[7] is contained in an addendum to the present document (A/CN.9/458/Add.2).

9. Section D of draft chapter I incorporates the substance of some portions of former chapter II, "Sector structure and regulation" (A/CN.9/444/Add.3), that dealt with organizational and administrative matters pertaining to the functioning of regulatory bodies.

10. Document A/CN.9/444/Add.2 contained, in its sections B and C, a discussion on the possible impact of other areas of legislation on the successful implementation of privately financed infrastructure projects and the possible relevance of international agreements entered into by the host country for domestic legislation on those projects. That discussion has been moved to draft chapter VII, "Governing law" (A/CN.9/458/Add.8).

Chapter II. Project risks and government support

11. An initial draft of chapter II (previously numbered chapter V) is contained in an addendum to the present document (A/CN.9/458/Add.3).

12. Section B of draft chapter II provides an overview of the main risks encountered in privately financed infrastructure projects and a brief discussion of common contractual solutions for risk allocation. Section C sets out policy considerations the Government may wish to take into account when designing the level of direct government support that may be provided to infrastructure projects and discusses some additional support measures that have been used in government programmes to promote private investment in infrastructure development, without advocating the use of any of them in particular. Lastly, sections D and E outline guarantees and support measures that may be provided by international and bilateral financial institutions.

Chapter III. Selection of the concessionaire

13. An earlier version of this chapter was contained in document A/CN.9/444/Add.4. A revised draft, which takes into account suggestions made at the thirty-first session of the Commission,[8] is contained in an addendum to the present document (A/CN.9/458/Add.4).

14. In preparing the revised version of draft chapter III, the Secretariat paid particular attention to the suggestion made at the thirty-first session of the Commission that the chapter should elaborate further on the fact that competitive procedures typically used for the procurement of goods, construction or services were not entirely suitable for privately financed infrastructure projects.[9] The Secretariat has endeavoured to avoid the use of terminology that in some legal systems is normally used in connection with procurement methods for the acquisition of goods, construction and services. Extensive revisions were made, in particular, to the sections dealing with pre-selection criteria, the contents of the final requests for proposals, evaluation criteria, procedures for opening and evaluating proposals, direct negotiations, unsolicited proposals and review procedures. The

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[7]Ibid., paras. 50-95.

[8]Ibid., paras. 123-175.

[9]Ibid., para. 129.

revised draft chapter also includes a new subsection dealing with measures to enhance transparency in direc negotiations.

Chapter IV. The project agreement

15. An earlier version of this chapter was contained in document A/CN.9/444/Add.5. A revised draft, whic takes into account suggestions made at the thirty-first session of the Commission,[10] is contained in an addendu to the present document (A/CN.9/458/Add.5).

Chapter V. Infrastructure development and operation

16. An initial draft of chapter V is contained in an addendum to the present document (A/CN.9/458/Add.6) The draft chapter combines issues previously proposed for discussion in separate chapters.[11]

17. Issues discussed in the draft chapter include legal issues relating to subcontracting and the constructio phase (previously proposed for inclusion in a separate chapter entitled "Construction phase"); conditions o operation of the infrastructure facility, level and quality of services, tariff structure and price adjustmen provisions (previously proposed for inclusion in a separate chapter entitled "Operational phase"); provision and remedies in the event of default or breach of the project agreement, provisions dealing with changes i conditions and unforeseen events, performance guarantees and insurance obligations of the concessionair (previously proposed for inclusion in a separate chapter entitled "Delays, defects and other failures to perform")

18. In line with the Commission's decision at its thirty-first session to move the substance of the discussio on regulatory issues that was contained in section C of former chapter II, "Sector structure and regulation (A/CN.9/444/Add.3), to a future chapter dealing with the operational phase,[12] draft chapter V contains a sectio dealing with a number of regulatory issues such as general duties of public service providers and price contro measures.

Chapter VI. End of project term, extension and termination

19. An initial draft of chapter VI (previously numbered chapter IX) is contained in an addendum to the presen document (A/CN.9/458/Add.7).

20. Section B deals with the question of whether and under what circumstances the project agreement ma be extended. Section C considers circumstances that may authorize the termination of the project agreemen prior to the expiry of its term. Lastly, section D deals with provisions for the winding-up of the projec including the transfer of project assets and the compensation to which either party may be entitled in the even of termination of the project agreement.

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[10]Ibid., paras. 176-201.

[11]See A/CN.9/444, paras. 21-24.

[12]*Official Records of the General Assembly, Fifty-third Session, Supplement No. 17* (A/53/17), paras. 101 and 102.

Chapter VII. Governing law

21. An initial draft of chapter VII (previously numbered chapter X) is contained in an addendum to the present document (A/CN.9/458/Add.8).

22. Section B of the draft chapter deals with the choice of law or laws governing the project agreement and other contracts entered into by the concessionaire during the life of the project. Section C points out a few selected aspects of the laws of the host country that, without necessarily dealing directly with privately financed infrastructure projects, may have an impact on their implementation. Section D indicates the possible relevance of a number of international agreements for the implementation of privately financed infrastructure projects in the host country. The substance of sections C and D was previously contained in an earlier version of chapter I, "General legislative considerations" (A/CN.9/444/Add.2).

Chapter VIII. Settlement of disputes

23. An initial draft of chapter VIII (previously numbered chapter XI) is contained in an addendum to the present document (A/CN.9/458/Add.9).

24. Section B of the draft chapter deals with mechanisms for the settlement of disputes between the concessionaire and the contracting authority. Section C deals with disputes between the concessionaire and other parties, such as its contractors, suppliers, lenders and customers. Lastly, section D deals with conciliation and similar methods of solving disputes.

III. CONCLUSIONS

25. The Commission may wish to note that the proposed timetable for the thirty-second session of the Commission, as set out in the provisional agenda (A/CN.9/453), provides for the first eight days of the session to be devoted to a discussion of the subject of privately financed infrastructure projects. It is suggested that the Commission use that period for an in-depth consideration of the draft chapters, in particular the revised structure of the legislative guide, whether the draft chapters cover the relevant issues, whether statements made adequately address the practical needs of privately financed infrastructure projects and whether the advice given is appropriate. The Commission may wish to consider whether the legislative recommendations, as currently formulated, adequately reflect the notion of concise legislative principles, as contemplated by the Commission.[13] The Commission may also wish to identify any other issues for which the formulation of model legislative provisions would increase the value of the legislative guide.[14]

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[13]Ibid., para. 204.

[14]Ibid., para. 21.